IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN, JAIPUR BENCH, JAIPUR

S. B. CIVIL MISC. APPEAL NO. 1581/2006

M/s. MSK Projects (I)(JV) Ltd. V State of Rajasthan & Anr.

Date of Judgment: 24th April 2007

Hon'ble Mr. Justice R. S. Chauhan

Mr. Paras Kuhad with
Mr. Pancham Surana and
Ms. Suhashini Rao, for the Appellant.
Mr. S.N. Gupta, for the Respondents.

(Per Court):
REPORTABLE

This appeal arises out of order dated 17.1.2006 passed by the District Judge, Jaipur City, Jaipur, whereby the objections raised by the respondents under Section 34 of the Arbitration and Conciliation Act, 1996 ('the Act', for short) has been allowed and the award dated 1-12-2003, passed in favor of the appellant, by the learned Arbitral Tribunal has been set aside.

The brief facts of the case are that by 1997, in Bharatpur the road going from Bharatpur to Mathura passed through a

highly congested area of the city. Therefore, the Public Works Department (henceforth to be referred as the respondents) were satisfied that a Bharatpur Bye-pass ('the project', for short) needs to be constructed. According to respondents, the project would consist of the Bye-pass from Bharatpur to Mathura (Km. 4/553) to Bharatpur-Jaipur Road, National Highway 11 (Km 59/800). The length of the Bye-pass would be 10.850 Kms. The project would also include the Bhartpur-Deeg Road. The Bharatpur-Deeg Road covered only 1.25 Kms of the total project of 10.850 Kms. (This is essential to spell out at this juncture as one of the two controversies in this case revolves around the Bharatpur-Deeg segment of the project).

Since due to financial constraint, the respondents were unable to construct the said project on their own, they invited tenders for the project. The project was to be done on the basis of Build, Operate and Transfer ('BOT', for short). In response thereto, the appellant filed their tender on 26.9.1997 and quoted the cost of the project as Rs.1, 325 lacs with a

total concession period as 111 months (9 years and 3 months), i. e. from 7-1-1999 to 6-4-2008, from the date of handing over the land till the handing over the facility to the respondents. However, prior to the finalization of the bid, on 4.9.1997, a Pre-Bid Conference took place where the respondents gave clarifications sought by the various bidders, including the levy and collection of toll on the Bharatpur-Deeg Section of the Bye-pass. Since the Bharatpur-Deeg Section of the Bye-pass was a short one, as pointed out above, doubts were raised whether the bidders will be allowed to levy and collect toll on this Section or not. During the Conference, the respondents agreed that toll would be levied and collected for this Section as well. It was also clarified by the respondents that in breach of contract, the amount of compensation would have to be worked out keeping in view the investments made by the entrepreneur.

On 5-2-1998, the financial bid was opened; on 25-7-1998 the respondents sent the letter of acceptance to the appellant. The appellant was called upon to furnish performance security

deposit, which they did. Thereafter, on 19-8-1998, the appellant and the respondent entered into a Concession Agreement--agreement for authorizing collection fee (Toll) by the concessionaire. According to the said agreement, the appellant was to recover the investment through levy of fees toll on all the users on the basis of fix tariff rate as prescribed by the Government published in the official gazette. The land was handed over by the respondents to the appellant on 7.1.1999. Therefore, the total concession period including the construction was from 7.1.1999 to 6.4.2008. However, the appellant completed the project on 10.4.2000 itself.

The said Bharatpur Bye-pass constructed by the appellant, was inaugurated on 12.4.2000. However, while inaugurating the said project, the then Chief Minister announced that no toll would be levied on vehicle plying over the Bharatpur-Deeg Section of the Bye-pass. Since the respondents had represented to the appellant that they would be permitted to levy toll on all the vehicles utilizing the Bharatpur-Deeg Section of the Bye-pass, the announcement

by the then Chief Minister took the appellant by surprise. Immediately, the appellant wrote to the respondents about the exorbitant loss that they would suffer if the announcement with regard to the Bharatpur-Deeg Section were implemented. Considering the loss that the appellant would suffer, the Government permitted the appellant to collect the toll on the said Section from 28.4.2000. However, due to severe agitation by the public, due to local pressures, the Collector, Bharatpur restrained the appellant from collecting the toll from the vehicles plying on the Bharatpur-Deeg Section from 13.5.2000. Since the appellant was suffering huge losses, a meeting was held in the Chamber of the PWD Secretary wherein a decision was taken that a joint survey would be made in order to assess the extent of loss suffered by the appellant. Consequently, a joint survey of the traffic passing through the Bharatpur-Deeg Segment was carried on by the Executive Engineer, PWD, the Sub-Divisional Magistrate, Bharatpur and the appellant from 3.7.2001 to 10.7.2001 (henceforth to be referred to as ‘the 2001 Survey’, for short); the losses incurred by the appellant came to be assessed and

quantified on the basis of the said Survey. The bar on collection of toll from the Bharatpur-Deeg section was one of the disputes, which erupted between the appellant and the respondents.

Another grievance that arose from the appellant's side related to the fact that the toll collection depended on the quantity of traffic passing through the Bharatpur Bye-pass. In case the traffic was not prohibited to pass through Bharatpur, the vehicles would continue to use the old route through Bhartpur and would thereby avoid using the Bharatpur Bye-pass. Hence, such traffic would avoid paying the toll. Thus, according to the appellant, the Government was duty bound to issue such notification as would restrict the traffic passing through the Bharatpur town, which was avoiding the payment of the toll. Despite the various representations made by the appellant to the respondents for preventing the traffic from circumventing the Bye-pass, the Government failed to issue the notification within a reasonable time: although the Bye-pass was inaugurated on 12-4-2000, the notification was not

issued till 1-9-2000 and was not made applicable till 1-10-2000. Thus, the appellant continued to suffer losses on this account also.

Therefore, vide letter dated 11.10.2001, the appellant invoked the Arbitration clause and prayed for appointment of an Arbitral Tribunal in accordance with Clause 18 of the Bid Document. According to Clause-18, an Arbitral Tribunal of three Arbitrators was to be appointed: one by the entrepreneur, one by the Government and third through mutual consent of both the Arbitrators so appointed by the parties. The appellant appointed Mr. A.P. Dalvi as the Arbitrator from their side and requested the respondents to appoint an Arbitrator from their side. However, the respondents did not pay any heed to the appellant's request. Hence, the appellant filed an arbitration application before this court. Vide order dated 12.4.2002, this court appointed one Mr. N.P. Mathur as the Arbitrator. Subsequently, Mr. Dalvi and Mr. Mathur appointed Mr. S.M. Duggar as the third Arbitrator. Hence, the Arbitral Tribunal of three Arbitrators was duly

constituted.

On 23.9.2002, the appellant filed their statement of claim; on 7.12.2002, the respondents filed their reply; on 21.12.2002, the appellant filed their rejoinder. Considering the pleadings of the parties, the learned Tribunal framed the following issues:

1. (a) Whether the claimant, as per agreement is entitled to collect toll on Bharatpur-Deeg road both ways or not?

   (b) As an effect of it, is claimant entitled to recover its amount of claim of Rs. 453. 69 lacs up to 31-12-2002 and onwards or not?

2. (a) Whether there was delay on the part of the State in issuing a Notification for restriction of traffic through the town, which has effected the toll tax or not? If so, how much delay and delay in full rate of safe implementation as on date, or not?

   (b) By virtue of it, is the claimant entitled to recover its claim of Rs. 292.17 lacs up to 31-12-2002 and

thereafter or not? Or merely by concession period as averred by the Respondent-State?

3. As a consequence of issue Nos. 1 & 2 which party breached the contract? Whether claimant or Respondent-State?
4. Whether the claimant is entitled to claim interest on its due claim amount as per decision of issue 1 & 2? If so, from what date and at what rate of simple/ compound interest?
5. Whether the claimant or Respondent- State is entitled for cost of Arbitration incurred and claimed by each party? If so, at what amount and to which party?
6. Any other if any demanded by any party during proceedings.

After considering the entire evidence, the learned Tribunal adjudicated each and every issue extensively and after giving findings on all issues, passed a detailed speaking

Award in favour of the appellant on 1.12.2003. The Arbitral Tribunal directed the respondents as under:-

(i) Pay a sum of Rs.990.52 Lacs (Rupees Nine Hundred Ninety, and Fifty-two Lacs only) towards actual loss under Issue No.1 and above, due up to 31.12.2003 under this award.

(ii) The respondent must also pay 18% simple interest on amount of Rs.990.52 Lacs to the claimant from 31.12.2002 up till it is actually paid to the claimant.

(iii) Relief 1 and 2 above are consequential effects of breach of contract by Respondent up to 31.12.2003 only. In order to plug such breach in totality so as to avoid its re-occurrences thereafter following directives to the Respondent are further awarded:

(a) As per agreement Claimant must be allowed to re-start toll collection on Bharatpur-Deeg Section of Bye-pass from 1.1.2004 so that performance of contract by both parties in right

sanctity, is resorted.

(b) The respondent must issue appropriate order in this regard to restore the rights of the claimant for toll collection on Bharatpur-Deeg section of the bypass.

(c) A police chowki be established near the tollbooth on Bharatpur-Deeg section of the Bye-pass to prevent any untowardly incidents as had occurred in the past and total cost in this regard shall be met with the claimant. The duration of this Police chowki is to be decided by both parties to the contract for maintaining law and order and smooth collection of toll by the claimant.

(d) The Tribunal directs respondent to permit claimant for relocation of tollbooth on existing highway i.e. on Jaipur-Bharatpur Road NH-11 and Mathura-Bharatpur Road just before the start of the by-pass. It further directs respondent that Police Chowkies shall be established at

both the ends of the Bye-pass, the cost of which will be borne by the claimant for such period as both parties may feel its necessary.

In case, somehow the relocation of the tollbooth on existing highways, i.e. Jaipur-Bharatpur Road NH-11 and Mathura-Bharatpur Road SH No.14 just before the start of the Bye-pass is not implemented, then respondent shall have to reimburse quarterly the claimant's loss in the toll revenue as calculated in Table T-5 up to the end of concession period. This reimbursement shall have to be made timely at the end of each quarter on the first day of the next quarter otherwise for delay additional liability of 18% p.a. simple interest will have to be paid by the respondent for such delay.

(e) In case the respondent (the State Govt.) somehow cannot implement (a), (b) and (c) referred above, then it shall have to reimburse quarterly, the claimant's loss in the toll revenue

as calculated in the Annexure-Table T-3 up to end of concession period. This reimbursement shall have to be made timely at the end of each quarter on the 1st day of the next quarter otherwise for any delay additional liability of @ 18% p.a. simple interest will be on the respondent for such delayed period.

(iv) Both the parties must meet their own cost of arbitration. No further relief of any kind has been awarded by the Tribunal to any party.

Since the said Award aggrieved the respondents, they filed objections under Section 34 of the Act before the learned Judge. The respondents raised the following objections: A) the learned Tribunal was bound by the contract entered into by the parties. The learned Tribunal has nowhere concluded that the respondents had committed breach of contract. Yet, still the learned Tribunal has awarded a huge compensation of Rs. 990.52 lacs in favor of the appellants. Since the offer was made on the basis of survey of traffic flow carried out on 14-4-94 and

15-4-94 (henceforth referred to as ‘the 1994 Survey’, for short), the learned Tribunal should have relied upon the said Survey for calculating the alleged loss suffered by the appellant. However, while assessing the loss caused to the appellant, the learned Tribunal has relied upon a survey carried out in 1997. Hence, the basis of calculation is misplaced.

B) According to Clause 15 (a) of the Bid Document, no financial liability could be imposed upon the State. At best, the State could be asked to increase the concession period. Yet, the learned Tribunal has placed a financial burden of Rs. 990.52 lacs on the State.

C) Without any evidence, the learned Tribunal has concluded that the then Chief Minister had announced that no toll would be realized on the Bharatpur-Deeg Section of the Bye-pass. Therefore, the award deserves to be set aside.

D) According to Clause 7 of the Concession Agreement, it was specifically stated that vehicles plying on ‘service road’

would be exempted from toll. The Bharatpur-Deeg section is a ‘service road’. Therefore, under Clause 7, the traffic is exempted from paying any toll. Hence, the appellant does not have the right to collect such toll on the said segment.

E) According to Clause 10 of the Concession Agreement, in case the toll rate is reduced, then the appellant can only seek extension of the concession period, but they could not seek monetary compensation.

F) No duty was cast on the respondents to prohibit the traffic from entering into Bharatpur and to ensure the said traffic is diverted to the Bye-pass either in the Bid Document, or in the Concession Agreement,. Despite the non-existence of such a duty, the learned Tribunal has held that the respondents have failed to issue the necessary notification within a reasonable time. Therefore, they have awarded compensation on this account also. Thus, the learned Tribunal has traveled beyond the contract between the parties. For these reasons, the learned Tribunal has committed misconduct.

Vide order dated 17-1-2006, the learned Judge set aside the said Award. Although the learned Judge accepts the contention of the appellant that the respondents had breached the condition with regard to the collection of the toll on the Bharatpur-Deeg section, the learned Judge sets aside the award on the following grounds: firstly, the learned Tribunal has erred in taking the 2001 Survey as the basis for calculating the loss suffered by the appellant. According to the learned Judge, the 1994 Survey should have formed the basis of such calculation and not the 2001 Survey. Secondly, the learned Judge has relied upon Condition No. 10 of the Concession Agreement to hold that the appellant was not entitled to any monetary compensation. Under Clause 10 of the Concession Agreement, the appellant was entitled only to extension of the concession period but no financial burden could be placed on the respondent. Hence, according to the learned Judge, the learned Tribunal has committed misconduct when it granted a compensation of Rs. 990.52 lacs to the appellant. For, thereby the learned Tribunal has placed ‘a financial burden’ on the

respondent. Thirdly, the learned Tribunal was not justified in imposing a simple interest of 18% per annum on the compensation amount. The learned Judge, therefore, reduced the interest rate from 18 % to 10 % per annum. Hence, the learned Judge quashed and set aside the award of the learned Tribunal as far as it related to Issue No. 1-B, 2-B and Issue No. 4. For the rest of the remaining award, the learned Judge directed that the remaining amount should be paid along with a simple interest of 10% per annum. Hence, this appeal before this court.

Mr. Paras Kuhad, the learned counsel for the appellant, has raised a plethora of arguments: firstly, the scope of judicial review of an arbitral award is limited; the learned Judge has traveled beyond the judicial limits.

Secondly, the counsel has taken this court through the relevant clauses of the Bid document, the minutes of the Pre-Bid Conference and the Concession Agreement to argue that the respondent had represented to the appellant that they

would be able to collect the toll on the Bharatpur-Deeg section of the Bharatpur Bye-pass. However, subsequently, the respondent had breached this condition.

Thirdly, according to the Bid document, the survey of 1994 was not the base mark as held by the learned Judge. In fact, the contract between the parties left it to the appellant to carry out their own survey of the traffic flow and to calculate the future prospect for increase in the traffic flow on the basis of their own survey.

Fourthly, in order to assess the extent of loss suffered by the appellant, the latest flow of traffic had to be calculated. This was done through the joint survey of the appellant and the officers of the respondent department in the form of 2001 Survey. The learned Tribunal has not relied on the survey conducted in 1997 as claimed by the respondents. In fact, the learned Tribunal had validly relied on the 2001 Survey to assess the loss suffered by the appellant. Therefore, the learned Tribunal has not gone beyond the contract while taking

the 2001 Survey as the basis for the assessment of loss.

Fifthly, the learned Judge has misread Clause No. 10 of the Concession Agreement. Clause No. 10 deals with the situation when the government reduces the toll rates chargeable by the appellant. It does not deal with the situation when the government has placed a total embargo on the appellant and has prevented them from collecting even a single penny from the toll on the Bharatpur-Deeg Section. In fact, according to Clauses-15 and 17 of the Bid Document, the compensation to be paid for breach of contract is to be based on the amount of investment made by the appellant and the losses suffered by them.

Sixthly, it was obvious to the parties that the appellant was making a huge investment in the project. The investment had to be realized as soon as possible. But, the investment could be realized only when the respondent ensured that vehicles are prevented from using the old route and are diverted to use the Bharatpur Bye-pass. Hence, it was an

implied condition of the contract that the respondent would issue the necessary notification preventing the people from using the old route and diverting them to the newly built Bharatpur Bye-pass. However, the respondent failed to issue the required notification within a reasonable time. Therefore, the appellant suffered losses from 12.4.2000 to 31.12.2003. Thus, the learned Tribunal was justified in awarding compensation to the appellant under this head also. But, the learned Judge has committed a mistake in not reading the implied condition of the contract and in denying the compensation to the appellant under this head.

Seventhly, the learned Arbitral Tribunal had correctly relied on Sections 73 and 74 of the Contract Act, 1872 to grant the compensation to the appellant for the losses suffered by them.

Lastly, the learned Judge has incorrectly relied on the case of M/s B. L. Gupta Construction (P) Ltd. v Bharat Co-operative Group Housing Society Ltd. (AIR 2004 SC 319) for

reducing the interest rate granted by the learned Tribunal. The facts of the said case are inapplicable to the present case.

On the other hand, Mr. S. N. Gupta, the learned counsel for the State, has argued firstly, the appellant is not entitled to collect the toll on the Bharatpur-Deeg section as the said section falls under the definition of “service lane”. According to Clause-7 of the Concession Agreement, no toll could be realized from vehicles plying on the ‘service lane’. Secondly, the learned counsel has feebly argued that according to the Bid document, the survey of 1994 was to form the basis of assessing the loss suffered by either party in case of breach of contract. However, he has conceded and according to us fairly that Clause 10 of the Concession Agreement is not applicable to the present case. Thus, according to him, the respondent is liable to compensate the appellant for the losses suffered by them. Thirdly, he has contended that there is no explicit requirement contained in the agreement, which requires the respondent to issue the notification prohibiting the people from using the old route and to take the Bharatpur Bye-pass. In the

absence of such a legal requirement, the learned Judge was justified in quashing the impugned award. Fourthly, the learned Judge was justified in reducing the interest rate from 18% to 10% per annum. Lastly, the scope of judicial review of an arbitral award is a vast one. He has, thus, supported the impugned order in a piece-meal fashion.

We have heard the learned counsels for the parties, have perused the impugned order and have examined the record that has been submitted before this court.

In order to understand the controversy, it is imperative to first consider the relevant clauses of the Bid Document, the Minutes of the Pre-Bid Conference held on 4-9-1997 and the Concession Agreement dated 19-8-1998. For, it is these documents, along with few others, which would be noted at the appropriate place, that throw light on the obligations and the liabilities between the parties. Hence, they are relevant for resolving the issues before this court.

According to the Concession Agreement, “the following documents shall be deemed to form and be read and construed as part of this agreement viz.

a) This form of Agreement.
b) The letter of acceptance dated 25-7-1998.
c) The Bid document along with the Project Report (Terms and conditions of BOT for highway).
d) Form A-5 (Financial Bid)
e) Agreement for authorizing collection of Fee (Toll) by Concessioner.
f) The drawings.
g) Letters dated 17-12-1998, 20-1-98, 19-3-98, 22-4-98 from Chief Engineer (Road-I) and Government letter dated 29-4-98 and letter dated 11-5-98 from Chief Engineer (Road-I).
h) Letters dated 17-12-97, 5-2-98, 27-3-98, 23-4-98 and 13-5-98 of the firm M/s MSK Projects (India) Ltd., (Joint Venture) Baroda extending the validity period up to 25-7-98.
i) Letter dated 25-7-1998 of M/s MSK Projects

(India) Ltd., (Joint Venture) Baroda.

According to the Bid Document, the location of the project also includes the Bhartpur-Deeg Section. The Bid Document also contains the data collected on the flow of traffic on 14th and 15th of April 1994. This data also includes the traffic flow on the Bharatpur-Deeg Section. Thus, clearly the Bharatpur-Deeg Section was considered to be an essential part of the project.

Moreover, the minutes of the Pre-Bid Conference also show that “the entrepreneurs wanted a clarification if the traffic plying between Bharatpur & Deeg or Deeg & Bharatpur would also be liable to pay the toll fee since this traffic would be using a very small portion of the Bye pass. It was clarified that this traffic would also be required to pay the toll fee.” Thus, at the Pre-Bid Conference the respondent had made a representation to the bidders that the users of the Bharatpur-Deeg Section, in both the directions, would be required to pay the toll fees. Hence, the right to realize the toll on the said Section was granted to the bidders. Once this representation was made,

once the said Section was included in the project, the respondent is estopped from disclaiming the inclusion of the said Section in the project. It is further estopped from claiming that the appellant is not entitled to collect the toll on the said Section. In case the said Section fell under the definition of 'service lane', the respondent would have explained the said position in the Pre-Bid Conference. But, instead the respondent promised the bidders that they would be allowed to collect the toll on the said segment. Now, the respondent cannot be permitted to wriggle out of the said commitment.

Furthermore, according to Clause 5 of the Concession Agreement, "the 'Government' would levy and charge fee (toll) from all persons incharge of vehicles using the 'project' facilities herein in accordance with the rates and manner specified…." (Emphasis added). The "Project" included the Bharatpur-Deeg Section. Hence, those who were using this Section of the project would also be liable to pay the toll to the appellant.

Of course, Clause 7 of the Concession Agreement does

lay down that “No fee (toll) will be collected on service roads, if any, constructed as part of the ‘Project’ and local light traffic will be permitted to ply free of charge on such service roads.” The term “service road” has not been defined either in the Bid Document or in the Concession Agreement. But according to the learned Tribunal, “technically a service road is a road temporarily constructed for use of traffic for a short period during the construction of the main road under progress when traffic is restricted to ply on the new road under-construction to protect it from being damaged during construction.” The learned Tribunal has correctly noticed and held that the Bharatpur-Deeg Section does not fall within the term “service road”. For, “the portion of the Bharatpur-Deeg section from Km. 6/075 to Km. 7/325 was improved, widened and strengthened to two-lane width, with the same specification as for the rest of the portions of the project. The cost of this improvement of this portion of 1.25 Km length is also included in the project cost, as verified from the bid document.” Hence, the learned Tribunal was justified in holding the Bhartapur-Deeg section as part of the project and subject to realization of toll. Therefore, the first

contention of the counsel for the State is unsustainable.

As far as the 1994 Survey is concerned, in order to prove the viability of the project to the prospective Bidders, the Bid Document also contained Clause No. 7—“Toll Prospects”. The Toll Prospect showed the “Daily Traffic Census and Growth rate” as per the data collected by Origin and Destination Survey (O & D Survey’, for short) on 14th and 15th of April 1994—the 1994 Survey. In order to prove the future prospect of growth of traffic, Clause No. 7 (ii) also claimed, “The average daily traffic is counted as per origin and destination survey. A traffic growth rate of 5 % per annum has been taken as per pervious years traffic growth.” Clause No. 7(v) further claimed, “The year 1994-95 has been taken as the base year for future projections of average daily traffic.” Thus, clearly the survey of 1994 had a very limited purpose—“forming the base year for future projections of average daily traffic.” Thus, the 1994 Survey was only of an indicative nature. It was never meant to be the last word on the traffic flow in the future. It was merely a yardstick—a means to visualize the future prospect of growth of traffic.

Moreover, Clause No. 8 of the Bid Document gave the Bidder the right to assess the viability of the project “as per his anticipations and considerations.” Throwing more light on the 1994 Survey, the Technical Report at Clause No. 5, dealing with Traffic, clearly states, “In order to asses the percentage of through traffic on the Bye Pass and the types of commodities carried, an origin and destination survey was carried out from 14th to 15th April 1994. The survey was carried out for 2 days (24 hours) by roadside interviews in both directions at four locations.

1. Agra Jaipur Raod NH-11 in Km. 63
2. Bharatpur mathura Road MDR-2 in Km. 3.
3. Bharatpur-Deeg Alwar Road SH –14 in Km. 3.
4. Bharatpur Sonkh road ODR-31 in Km. 1.

The survey conducted was on a random sample basis for all type of vehicles. ”

The Technical Report also clearly proves that the survey was not done meticulously, but at random. Secondly, the Survey was done on the Bharatpur-Deeg

Section as well. This supports the fact that Bharatpur-Deeg section was an integral part of the project.

Most Importantly, the Bid Document clearly contains a disclaimer when it states, “No guarantee for the data included in the Project Report can be made by Government although it will be prepared to the best of information and the entrepreneur should make his own assessments also.” This clearly proves that the government was not treating the 1994 Survey as infallible and as binding on the bidders. The bidder was free to make his own survey and projections about the future flow of traffic to determine the viability of the project. This was also in the logic of things, as an entrepreneur would like to meticulously examine the economic viability of the project before investing a large amount of capital into the project. This is more essential when the project has a long gestation period before it becomes profitable. Considering the financial implications, the 1994 Survey for a project beginning in 1999 may be too stale;

therefore, the bidders were given the freedom to carry out their own survey and to base their future prospects on the basis of such a survey. The staleness of the 1994 Survey is also proven from the fact that at the Pre-Bid Conference the prospective Bidders had asked for a more “recent” survey of the traffic flow. Therefore, another survey was carried out in 1997 and the data so collected was supplied to the prospective Bidders. In the minutes of the Pre-Bid Conference, the respondent have clearly stated at Point No. 7 “ Regarding the Force Majeure clause, M/s TCI Infrastructure Fiance Limited wanted a guarantee for the minimum traffic. It was clarified that the Department can give no minimum guarantee.” Hence, the respondent was not even in a position to give the minimum guarantee of flow of traffic on the basis of 1994 Survey. Hence, the respondent was not relying of the 1994 Survey.

Once the parties to the contract were not relying on the 1994 Survey as the final word, the learned Judge has certainly erred in taking the 1994 Survey as the basis for

calculating the loss suffered by the appellant. By doing so, the learned Judge has gone contrary to the intention of the parties themselves. While interpreting a contract, the court is supposed to decipher the intention of the parties and to implement the same. However, in the present case, the learned Judge has misinterpreted the intention of the parties and has wrongly found fault with the learned Tribunal for having discarded the 1994 Survey as the basis of calculating the loss suffered by the appellant. The respondents have wrongly pleaded that the learned Tribunal had relied upon the 1997 Survey to calculate the loss suffered by the appellant. A bare perusal of the Award clearly reveals that the learned Tribunal had taken the 2001 Survey, and according to us rightly so, for calculating the loss suffered by the appellant.

In fact, the loss suffered by a party has to be calculated as close to the date of the loss as possible. For, the traffic flow is increasing by leaps and bounds; the scenario has certainly

changed between 1994 and 2001. Therefore, in order to calculate the precise loss caused to the appellant, the respondent and the appellant had carried out the 2001 Survey. This 2001 Survey was carried out with the consent of the parties. Moreover, the purpose of the survey was to realistically assess the loss suffered by the parties. The said survey, obviously, was not carried out as a mere formality--without any rhyme or reason. As Hamlet said, “there is some logic in my madness”. Thus, there is also some ‘logic’ in carrying out the survey in 2001. Since the parties conducted the 2001 Survey, the respondent cannot be permitted to claim that the said survey is outside the scope of the contract between the parties or to plead that the said survey is not binding on the parties. Once having participated in carrying out the survey, the respondent is estopped from challenging its validity or its scope and ambit. It cannot be termed to be “outside the scope of the contract between the parties”. Hence, the learned Tribunal did not commit any misconduct when it relied on ‘the logic’ of the 2001 Survey to assess the loss suffered by the appellant. In fact, the learned Judge has erred in holding that the 2001

Survey is outside the scope of contract. The learned Judge has also faulted in holding that the learned Tribunal has gone outside the scope of contract by relying on the 2001 Survey in order to assess the loss. Hence, the reasoning of the learned Judge holding the learned Tribunal as having committed misconduct is unsustainable.

Further, the learned Judge has incorrectly relied on Clause 10 of the Concession Agreement to hold that the learned Tribunal had erred in granting monetary compensation to the appellant. In the Bid Document condition No. 17 clearly stated, " Default of any of the clause specified here above by either party i. e. the entrepreneur or the Government will tantamount to a breach of these terms and conditions and the defaulted party will be liable to claim compensation from the defaulting party including even cancellation of contract." (Emphasis added). At the Pre-Bid Conference, some of the bidders had asked a clarification about Clause 17 mentioned above. The respondent had held out to the bidders that "the amount of compensation will have to be worked out keeping in

view the investments made by the entrepreneur. In case of dispute, there is sufficient provision in the agreement under Clause 18 for Arbitration." Thus, monetary compensation was not ruled out. According to the respondent, in case of breach of contract, the compensation had to be calculated in the arbitral proceedings. Hence, the learned Tribunal had not committed an illegality in granting monetary compensation to the appellant.

The learned Judge has relied upon Clause 10 of the Concession Agreement to deny monetary compensation to the appellant. The said Clause is as under:

> "Government" will not be responsible for any eventuality which may cause reduction in collection of fee (toll) due to any reason whatsoever including strikes, rains or any other except for a decision by "Government" or reduction in the rates of fee (toll), in which case extension of the period of Concession will be mutually negotiated. In case the rate of fee (toll) is enhanced by the "Government" the reduction in the period of concession will be mutually negotiated.

This Clause is a duplication of Clause 15 of the Bid Document. Thus, it would have to be read in light of the Clause 15 of the Bid Document. Unlike the Concession Agreement,

Clause 7 (B) of the Bid Document contains a Schedule for the rate of fee (toll) applicable to different vehicles plying on the Bharatpur Bye-pass. The said fee was to be prescribed by the “Government”. Since the entrepreneur was to recover his investment from the collection of toll fee, the years of concession period, naturally, depended on the rate of fee (toll) fixed by the Government. In light of this, Clause 15 of the Bid Document contained the same stipulation as Clause 10 of the Concession Agreement quoted above. Therefore, both Clause 10 of the Concession Agreement and Clause 15 of the Bid Document dealt with the power of the government to reduce or enhance the fee (toll) and the necessity to reduce or enlarge the concession period after holding due negotiation with the entrepreneur. Clearly, these Clauses deal with “reduction of rate” and not with “prevention of toll collection”. But the present case is not a case of “reduction in the rates”, but is of the “government” prohibiting the appellant from collecting the toll. Thus, Clause 10 of the Concession Agreement was inapplicable to the case in hand.

Moreover, the reasoning of the learned Judge is flawed. In case Clause 10 of the Concession Agreement were applied, then the “government” and the appellant should re-negotiate the concession period applicable to the Bhartpur-Deeg sector. However, as the appellant is barred from collecting the toll on the said sector, no matter how far the concession period were to be extended, the appellant would not be able to recover the loss suffered by him due to the prohibition. Thus, clearly Clause 10 of the Concession Agreement is inapplicable.

Curiously, the learned Judge has concluded that the respondent had committed a breach of the contract. Yet, the learned Judge has totally ignored the existence of Clause 17 of the Bid Document and the understanding reached between the parties at the Pre-Bid Conference held on 4-9-1997. Thus, the learned Judge has failed to apply the relevant provision of the contract. Hence, the impugned order is unsustainable.

As far as the publication of the Notification is concerned, Mr. Paras Kuhad has canvassed the reason for such

notification. According to the learned counsel, although the Bye-pass was inaugurated on 12.4.2000, the necessary notification was issued only on 1-9-2000. Due to the omission on the part of the government in issuance of the notification, the appellant suffered the loss. However, such an argument is untenable. For, neither in the Bid Document, nor in the Pre-Bid Conference, nor in the Concession Agreement is there any stipulation placing a duty on the government to issue the notification barring the use of the old route and directing the vehicles to use the newly constructed Bharatpur Bye-pass within a stipulated time frame. In the absence of an explicit condition, such a stipulation cannot be read impliedly. Hence, the learned Tribunal was unjustified in granting compensation of Rs. 276.99 Lacs for the loss of traffic flow from 12.4.2000 to 31.12.2003 because of the absence of the notification by the government. In our view, the learned Judge was justified in setting aside the compensation under this category.

The learned Judge was equally justified in reducing the interest rate from 18% to 10% per annum. A bare perusal of the

award clearly reveals that the appellant had sought a 20% interest on the compensation amount. However, considering the provisions of Section 31(7)(b) of the Act and considering the relevant case law, the Tribunal awarded an interest of 18% per annum. Recently while dealing with the interest awardable under the Act, in the case of Krishna Bhagya Jala Nigam Ltd. Vs. G. Harishchandra Reddy & Ano. (AIR 2007 SCW 527), the Hon'ble Supreme Court has observed that “after economic reforms in our country the interest regime has changed and the rates have substantially reduced and therefore, we are of the view that the interest awarded by the Arbitrator at 18% for the pre-arbitration period, for the pendente lite period and the future interest be reduced to 9%.” Although, Section 31(7)(b) prescribes 18% interest to be paid, but the provision is not mandatory in nature. A balance has to be struck between the legal provision and the economic reality of the day. Hence, the learned Judge was justified in reducing the simple interest rate from 18% to 10% per annum.

Before hastily interfering with Arbitral Award, the court

should keep in mind the scope of judicial review in Arbitral Award matters. The scope of judicial review of the arbitral award is a narrow one. In order to escape the agony of a protracted trial, in order to save time and expenses, arbitration was developed as an alternate dispute resolution forum. In the commercial world, where time is of essence and large amount of money is involved, the parties prefer to go for arbitration rather than for civil suit. The long gestation period of a civil suit, which meanders through a labyrinth of procedures and, at times, climbs the judicial pyramid, has persuaded the parties to place an arbitration clause in the contract. The scope and ambit of judicial review over an award passed by an arbitrator are now well settled. The arbitrator is a Judge appointed by both the parties after reaching a consensus, or a Court appoints him under the provisions of the Act. Since the Arbitrator is a Judge appointed by the parties, the parties are bound by his decision even if the award is wrong either on law or on facts. Even an error of law on the face of the award cannot nullify the award. Thus, his decision is final unless the reasons given by him are totally perverse or the award is based on wrong proposition of

law. But once it is found that the view of the Arbitrator is a plausible one, the Court cannot reverse it by interfering with the award. Moreover, the interpretation of a contract is a matter solely within the domain of the arbitrator. Therefore, the Court should be very weary of interpreting the contract. Similarly, the courts are precluded from reappraising the evidence produced before the arbitrator. The court does not sit in an appeal over the verdict of an arbitrator by reexamining and reappraising the materials placed before him. In case two views are possible, the Court is not justified in interfering with the award by adopting its own interpretation. Even if it could be proved that the arbitrator has committed some mistake while arriving at his conclusion, such a proof would not invalidate the award. Moreover, it is not “misconduct” on the part of the arbitrator to give a reasoned decision, where his error is one of the fact or of law. Furthermore, even if there is an error of construction of the agreement by the arbitrator, the same is not amenable to correction. Lastly the reasonableness of an award is not a matter for the Court of consider unless the award is preposterous or absurd. [(Ref. to M/s Engineers Syndicate v

State of Bihar & Ors (2007 AIR SCW 985), Maharashtra State Electricity Board Vs. Sterlite Industries (India) & Anr. (2001 (8) SCC 482), Bharat Coking Coal Ltd. Vs. L.K. Ahuja (2004 (5) SCC 109), Rajasthan State Electricity Board Vs. M/s. Gammon India Ltd. (1998 DNJ (Raj.) 680), Indu Engineering & Textiles Ltd. Vs. Delhi Development Authority (AIR 2001 SC 2668), State of U.P. Vs. Allied Constructions (2003 (7) SCC 396), Rajasthan State Mines & Minerals Ltd. Vs. Eastern Engineering Enterprises (1999 (9) SCC 283) and D.D. Sharma Vs. Union of India (2004 (5) SCC 325)]. Therefore, the learned Judge should not have interfered briskly with the award of the learned Tribunal.

The area where the learned Judge is justified in interfering with the award is the grant of Rs.276.99 Lacs as the loss suffered by the appellant during the period of 12.4.2000 to 31.12.2003 on account of the Government not publishing the required notification for preventing the entry of vehicles into Bharatpur. As stated above, there was no such requirement in the Bid Document or in the Concession Agreement. Since the

Tribunal had traveled beyond the scope of the contract, the learned Judge was certainly justified in setting aside the compensation granted under this heading. The learned Judge was equally justified in reducing the interest rate.

In the result, the impugned order dated 17.1.2006 passed by the District Judge, Jaipur is modified to the extent that the Judge's finding with regard to Issue No. 1-B is quashed and set aside and his finding on Issue Nos.2-B and 4 are confirmed. Consequently, the award dated 1.12.2003 is modified to the extent that the respondents need not pay Rs. 276.99 Lacs to the appellant. Subtracting the said amount from the amount of Rs. 990.52 Lacs, as awarded by the learned Tribunal, the respondents are directed to pay a compensation of Rs. 723.53 Lacs (Rs.990.52 Lacs – Rs.276.99 Lacs = Rs.723.53 Lacs) to the appellant. The respondents shall pay the said amount with simple interest @ 10% per annum from 31.12.2003 till actual payment is made to the appellant. The respondents shall also implement the other directions issued by the learned Tribunal expeditiously. This appeal is, thus, partly allowed. There shall

be no order as to cost of litigation.

R.S. Chauhan, J.